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EXAMINER

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ART UNIT

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 12

Application Number: 08/834,777
Filing Date: April 3, 1997
Appellant(s): Heindel et al.

Jeffrey B. Curtin
For Appellant

EXAMINER'S ANSWER

This is in response to appellant's brief on appeal filed 4/26/99.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

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A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 35, 43, 44, 48, 50-57 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal.

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5,176,670

Roessler et al.

5-1993

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

Claims 35, 43, 48, 50-57 are rejected under 35 U.S.C. 102(b) as being anticipated by Roessler et al. '5,176,670.

Roessler discloses a disposable absorbent article comprising an outer cover (11), a bodyside liner (21), an absorbent core (22), and at least one hook-and-loop type mechanical fasteners (30) on the ear tab (17, 18), wherein the hook material includes a base sheet and stemlike projections (31). The stemlike projections are releasable engaged with the loop material which is joined to the outer cover. With respect to the elastic ear tab, it is the examiner's position that the waist portions 12 and 13 of Roessler anticipates appellant's 'ear tabs'. Moreover, see column 5, lines 24-40, wherein Roessler teaches the waist portion may be comprised of an elastomeric stretch bonded laminate. Alternatively, figure 11 discloses side panels 36 and 37 that may be composed an elastic material properties, see column 10, lines 12-20. In regards to the placement of the hook and loop positioning on the diaper, see column 10, lines 36-40. With the claim limitation of peel strength of at least about 20 grams, Roessler discloses the hook and loop fastener having a peel force in the range of about 200-1200 grams.

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Claim 44 is rejected under 35 U.S.C. 103(a) as being unpatentable over Roessler et al.

Roessler discloses the invention substantially as claimed, including the peel strength force of about 200-1200 grams, however Roessler does not disclose a peel strength of from about 30 to 90 grams. In application's specification, the peel strength is not taught to solve any particular problem or produce any unforeseen result, and therefore is considered a matter of routine engineering choice barring some convincing evidence of criticality. Accordingly, it would have been obvious matter of design choice to modify Roessler by having the fasteners with a peel strength of 30 to 90 grams, since appellant has not disclosed that having the peel strength at this specific force solves any stated problem or is for any particular purpose and it appears that the fasteners would perform equally well with a lower peel strength force.

(11) Response to Argument

Appellant argues that the prior art reference of Roessler fails to disclose "an elastic ear tab which is attached to and extends from at least one of the outer cover and bodyside liner of the absorbent article", however, Roessler clearly teaches the elastic ear tab, see figure 6, element 36 and 37. With respect to appellant's argument that Roessler fails to disclose "the stemlike projections of the hook material are releasably engaged with the elastic ear tab" is also found non-persuasive. The examiner turns the attention to figure 6. Figure 6 clearly illustrates that the tab 30 folded inwardly in position next to the topsheet for storing the hook

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material of the fastener. Accordingly, Roessler discloses the topsheet composed from an elastic or inelastic polymer filament web, see particularly column 4, lines 40-47.

Alternatively, it would be inherent to fold the tab fastener 30 of Roessler to releasably engage the hook material 31 onto the tab fastener 30, instead of releasably attaching the tab fastener onto the topsheet. With respect to applicant's other argument that the claimed invention "protects the stemlike projections before the article is packaged" is found non-persuasive. See column 9, lines 21-29 in Roessler. In addition, packaging of disposable absorbent articles in multiples unit, prior to use, have been found to be generally well known knowledge by those ordinarily skilled in the art.

Moreover, it has been held that a claim is anticipated if each element of the claim is found, either expressly described or under principles of inherency, in a single prior art reference, or that the claimed invention was previously known or embodied in a single prior art device or practice.

With respect to appellant's argument that Roessler fails to teach "pant-like structure before article is packaged", it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitation.

With respect to appellant's argument pertaining to claims 51, 56 and 57 ("the stemlike projections of the hook material are releasably engaged with the outer cover"), Roessler

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discloses, alternatively that the positioning of the hook material and the loop material may be reversed. Therefore, inherently positioning the tab fastener on the outer cover.

In regards to claim 44, that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



CORRINE McDERMOTT
PRIMARY EXAMINER

dj cho

July 5, 1999

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